IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1268

HERBERT LEO PALM,

Petitioner,

v.

THE VETERANS ADMINISTRATION OF THE UNITED STATES OF AMERICA and THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on October 14, 1977.

CITATIONS TO OPINIONS BELOW

The Administrative Denial of the Respondent Veterans Administration dated August 15, 1974 is unreported and is printed in Appendix E hereto, infra, p. 1e. The initial order of the District Court entered on October 6, 1975 is printed in Appendix B hereto, infra, p. 1b. The order of the Circuit Court of Appeals granting leave to withdraw the appeal without prejudice to renewal entered on September 22, 1976 is printed in Appendix D hereto, infra, p. 1d. The opinion of the District Court to Petitioner's Rule 60 (b)(2) Federal Rules of Civil Procedure motion entered on January 28, 1977 is printed in Appendix C hereto, infra, p. 1c. The judgment of the Circuit Court of Appeals entered on October 14, 1977 is printed in Appendix A hereto, infra, p. 1a. The opinion of the District Court in Petitioner's Mandamus companion case entered on August 6, 1975 is printed in Appendix F hereto, infra, p. 1f. Neither the District Court's endorsement entered on October 6, 1975 nor its opinion entered on January 28, 1977 nor the Circuit Court of Appeals' order entered on September 22, 1976 nor its judgment entered on October 14, 1977 are reported. Petitioner does not know whether or not the District Court's opinion in the Mandamus companion case entered on August 6, 1975 was reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was dated and entered on October 14, 1977 (Appendix A, p. 1a, infra), and received by Petitioner on December 5, 1977 only, i.e. 52 days after it was entered. Appellant-Petitioner, Pro Se, was notified that the appeal would be decided on submission and was not asked to appear in person for an oral argument, whereas the judgment states that the appeal was argued by counsel. The judgment includes no opinion on the arguments and facts submitted. For these reasons, a petition for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure which must be filed within 14 days after the judgment is entered could not be filed. Order Extending Time To File Petition For Writ Of Certiorari No. A-518, dated December 16, 1977, signed by the Honorable Thurgood Marshall, Associate Justice of the Supreme Court of the United States, extended the time within which to file this petition for writ of certiorari to and including March 13, 1978. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether or not the Circuit Court of Appeals should really have dismissed the appeal and remand the case to the District Court with instructions to give leave to amend the *complaint* on the ground that the underlying District Court order entered on October 6, 1975 dismissing the complaint (Appendix B, p. 1b, infra) is not a final and appealable order because a judgment dismissing the *action* was never entered, and because the action could definitely be saved by an amendment of the complaint, and because Petitioner has shown by his Rule 60(b)(2) Federal Rules of Civil Procedure motion that he first wanted to exhaust all available remedies then known to him in the District Court before proceeding with the appeal?

2. Whether or not the trial judge, having two related complaints simultaneously before him from the same Plaintiff-Petitioner, can exclude his knowledge of the essential facts of Petitioner's criminal persecution presented in detail in Petitioner's Mandamus companion action *Number 75 Civ*

315 (CMM) from consideration at time of deciding on the running of the statute of limitations on the Tort action underlying this petition?

3. Whether or not the trial judge can in these circumstances decide the Tort case on submission without holding the requested oral hearing for the purpose of making the inquiry in depth necessary for the purpose of exploring and selecting the proper facts and grounds applicable to tolling the statute of limitations known to him to be available in this case from Petitioner's Mandamus companion case *Number 75 Civ 315 (CMM)* that was simultaneously pending before said trial judge?

4. Whether or not the trial judge aside from his negative ruling on mental incompetency was obligated to rule or give an opinion on Petitioner's contention made in and supported by his Rule 60(b)(2) Federal Rules of Civil Procedure motion that:

(a) The *"continuous treatment rule"*;
(b) The fact that Petitioner's *"authoritative discovery"* was made on September 24, 1974 only; (after the date of Respondents' Administrative Denial of August 15, 1974);
(c) That Respondent Veterans Administration determined that the filing of Petitioner's Disability Insurance Claim was impossible until October 13, 1974 *due to circumstances beyond Petitioner's control,*

must also toll the statute of limitations applicable to Petitioner's Adminsitrative Claim under the Federal Tort Claims Act against Respondent Veterans Administration until August 2, 1974 at least, when it was actually filed?

5. Whether or not the Circuit Court of Appeals, having been informed about the misconduct of Petitioner's former

attorney, can or must ignore the essential record of Petitioner's Mandamus companion action *Number 75 Civ 315 (CMM)* and corroborating evidence submitted with Petitioner's Appellant's Brief and Appellant's Reply Brief in the form of Exhibits and by reference to the original record when making its decision on the appeal, and whether the Circuit Court of Appeals was not required in such case to include in its judgment an opinion, so that Petitioner would not have to guess the grounds for the judgment underlying this petition?

6. Whether or not the proceedings would be in violation of the *"equal protection"* and *"due process"* clauses of the United States Constitution if Appellees-Respondents were permitted to present oral argument to the Circuit Court of Appeals, whereas Appellant-Petitioner was advised by letter that the appeal would be taken on submission?

7. Whether or not basic law principles, common law and the United States Constitution toll the two-year statute of limitations of the Federal Tort Claims Act – 28 U.S.C. §2401(b) – in this *extraordinary case* due to the fact that the Petitioner was by the MOST CRUEL and BRUTAL CRIMINAL, UNLAWFUL and UNCONSTITUTIONAL means (conspiracy, duress, fraud, criminal medical malpractices and other criminal acts causing Petitioner great bodily harm) on the part of employees of the United States Government, functionaries of organized medicine and organized crime, Interpol, and others in the United States and beyond the seas prevented from filing this Tort Claim within the normal statutory limits?

8. Whether or not it was the intent of Congress to deprive anyone prevented by CRIMINAL, UNLAWFUL and UNCONSTITUTIONAL means from timely filing of his rights under the Federal Tort Claims Act?

9. Whether or not basic law principles and common law permit the Respondents to deprive anyone of his legal rights in general (also created or substantive rights) by CRIMINAL, UNLAWFUL and UNCONSTITUTIONAL means, as they have been doing all along and are still doing to this date with respect to the Petitioner, and then be the beneficiary of such unlawful acts, because this is "CONTRA BONOS MORES," and tolls any statute of limitations?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The constitutional provisions are: The 4th, 5th, 8th and 14th Amendments of the United States Constitution (*right to be secure in his person; right not to be deprived of life, liberty or property without due process; nor infliction of cruel and unusual punishment; right to equal protection of the laws*).

The statutory provisions involved are: THE FEDERAL TORT CLAIMS ACT: July 18, 1966, Pub.L. 89-506, §7, 80 Stat. 307, 28 U.S.C. §2401(b), reading:

> "ATort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

STATEMENT OF THE CASE

Petitioner is a naturalized United States citizen since 1943 and a United States Army D-day infantry veteran

of the second World War, having been inducted into the United States Army on June 27, 1941 and honorably discharged as Master Sergeant on October 23, 1945. He was in combat from the first to the last day of that war, is a holder of the Bronze Star Medal, Combat Infantryman Badge, Bronze Arrow Head, and a Letter of Commendation issued by the Commanding Officer, 24th Cavalry Reconnaissance Squadron, Mechanized, United States Army, endorsed by the Commanding Officer, 4th Cavalry Group, and endorsed by the Commanding General of VII Army Corps. He also has recognized service-connected disabilities. He was never in conflict with the law, except for a few traffic tickets.

Petitioner's Pro Se Application for Writs of Mandamus against the United States of America and five Federal Department and Agency Heads and their respective Departments, *including* the Respondent VETERANS ADMINISTRATION, dated September 9, 1974 and redated October 15, 1974, together with Petitioner's 30-page Affidavit and many other Exhibits was filed by the Clerk of the United States District Court for the Southern District of New York beginning of 1975 and assigned to *District Judge Charles M. Metzner – File Number 75 Civ 315 (CMM).* These documents showed that Petitioner had in the year 1965 been criminally malpracticed on by physicians in New York City for the purpose of causing him a so-called "natural death" on the orders of the New York Crime Syndicate and New York City Police Department; that he had been further criminally malpracticed on and had been denied proper medical treatment by all United States Government and private physicians seen, that he had simultaneously been poisoned by illegally adulterated water, food and medicines, and had been made fatally ill and severely allergic, and that he is since that time up to the present time being persecuted

in all countries he visited by INTERPOL, certain agencies of the Respondent United States of America, as well as by functionaries of organized crime and of fraternal organizations; that Petitioner had since that time been kept ill by these means and additional criminal medical malpractices and that he had been close to death due to such *actual murder attempts several times* since the year 1965; that there has since prior to May 18, 1965 been a continuous *conspiracy to murder him* and *otherwise violate his civil rights, constitutional rights* and *human rights, including infliction of great bodily harm; continuous duress* and *undue influence, as well as a continuous conspiracy to obstruct justice* and *the due administration of the laws with respect to the Petitioner,* as well as *continuous refusal of consular protection,* a statutory right of Petitioner pursuant to 22 U.S.C. §1731 and §1732, as well as *illegal imprisonment for over 7 months in 1965, 1967 and 1968* in *two mental hospitals* under the auspices of agencies of the *Respondent United States of America,* as well as continuous adulteration of drinking water, food and medicines, with only short interruptions, for the purpose of *poisoning* the Petitioner via his severe allergies from the original medical malpractices, and *unlawful persecution* of the Petitioner in general; that there were at least 25 criminal Federal Statutes severely violated in Petitioner's case, not to speak of New York State criminal statutes.

The record shows that the then United States Attorney for the Southern District of New York abused his discretion and refused to investigate and prosecute Petitioner's serious and provable charges inspite of the fact that Petitioner had with the original complaint submitted proof that on six separate occasions in March, April and May of 1974 registered letters from the Petitioner to prominent New York City attorneys were defrauded by officials of the

Respondent's United States Post Office Department, and the postal return receipts were forged. Instead, said United States Attorney moved to dismiss Petitioner's Mandamus Companion complaint by invoking his discretion to take this inaction, all of which proves the magnitude of the conspiracy to obstruct justice and the due administration of the laws, as well as DURESS and UNDUE INFLUENCE exercised upon the Petitioner by PARAMOUNT AUTHORITY.

Said trial judge granted Respondents' Rule 12 Federal Rules of Civil Procedure motion for dismissal without oral hearing with opinion entered on August 6, 1975,[1] (Appendix F, p. 1f, infra), two months prior to rendering the first of the two judgments underlying this petition, (Appendix B, p. 1b, infra), whose underlying complaint was already pending before said same trial judge since February 13, 1975. Due to the unusual and scandalous nature of the facts of Petitioner's Mandamus complaint, said trial judge could not possibly forget it. Said same trial judge even refused Petitioner's request for direct referral of the Mandamus case by him to the Federal Grand Jury, even though he confirmed in his opinion this right of his, which in Petitioner's opinion was even his duty pursuant to 18 U.S.C. §4 in view of the magnitude of the crimes involved. Petitioner thereafter used further diligence and requested the Federal Grand Jury for the Southern District of New York direct for an investigation and never received a reply from

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[1] In spite of the fact that it had been pointed out that 42 U.S.C. §1987 requires the U.S. Attorneys to institute prosecution against all persons violating any of the provisions of 18 U.S.C. §241, §242, which were actually most severely violated in Petitioner's case.

said Federal Grand Jury. Petitioner had in each case offered himself as government witness subject to proper security arrangements by the Attorney General.

On or about February 13, 1975, Petitioner through an attorney filed the Tort complaint underlying this petition in the *same* District Court, and the case was assigned to the *same District Judge (Charles M. Metzner) – File Number 75 Civ 748 (CMM).* It involves medical malpractice on the Petitioner and omissions of negligent magnitude by employees of the Veterans Administration on or about September 1, 1965 and on or about October 23, 1965 in conjunction with prior criminal medical malpractice by various other New York City physicians for the purpose of causing the Petitioner a so-called "natural death" on orders of the New York City Police Department and the New York Crime Syndicate which were apparently falsely told that Petitioner would be a witness in the Police corruption investigation then conducted by a Grand Jury under the auspices of the New York County District Attorney.

The jurisdiction of the District Court was invoked because the case arises under the Federal Tort Claims Act, 28 U.S.C. §1346(b), §2671 et seq.

The same attorney then also represented Petitioner against Respondents' motion to dismiss the *Mandamus* complaint. Respondents moved pursuant to Rule 12 – Federal Rules of Civil Procedure – for dismissal of this Tort complaint as time-barred pursuant to 28 U.S.C. §2401(b). The *same* Assistant United States Attorney represented the Respondents in the Mandamus and Tort case. Petitioner's attorney moved on July 10, 1975 for denial of the dismissal motion on the grounds that petitioner was under *mental incapacity* tolling the statute of limitations. While his Memorandum of Law

did not mention the Mandamus complaint directly which at that time was still pending before the *same* trial judge, it did mention:

> ". . . that the plaintiff was a "prisoner" of his own mental delusion that he was being persecuted by various agencies of the United States of America and that in fact he was under such an incapacity that he left the United States to reside in Germany because he was fearful of his safety in the United States.
>
> This fear has continued to the present date.
>
> . . . that the plaintiff driven by, what may very well "had" been an unfounded fear of being poisoned or put to death by various agenices of the United States government nevertheless, that he in fact did believe such circumstances to exist. . .
>
> . . . in fact even now labors under the delusion that he is in fear of his life, and, therefore, will not return to the United States unless the United States provides him sufficient security . . ." (*Appendix Pages 6 and 7 of Appellant's Brief*); (*District Court Docket Number 7*).

From these persecution facts presented now as "mental delusion" by his former attorney and the tenor of his Memorandum of Law it is clear that he expected the trial judge to know all about Petitioner's criminal persecution background from the contents of the Mandamus companion case then pending before said same trial judge and from further discussion of it at the requested oral hearing. Without permitting this oral hearing, the trial judge with order entered on October 6, 1975 granted Respondents' motion to dismiss the Tort complaint as time-barred on the ground:

> "There is no showing of mental incompetency within the two-year period to avoid this result." (Appendix B, p. 1b, infra).

This proves that the trial judge, like the Respondents by filing a Rule 12–Federal Rules of Civil Procedure Motion, agreed that the contents of Petitioner's Mandamus complaint were true facts and not delusions.

Petitioner, Pro Se, filed a timely Notice of Appeal with the District Court pointing out therein that he was forced to relieve his attorney due to serious misconduct (he was later admonished for his misconduct by the Committee on Grievances of The Association of the Bar of the City of New York); that he acted against plaintiff's specific instructions by pleading mental incapacity; that he was not authorized to do so under any condition; that for this reason, he did not furnish Petitioner the requested copy of his Motion and Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Complaint filed on July 10, 1975 until October 28, 1975, *22 days after* the District Court's dismissal of the complaint, and then only after extraordinary pressure had been put on him after he failed to respond to many previous requests for said copies; that he never furnished Petitioner the District Court's order in spite of prior instructions and repeated requests to do so; that Petitioner had furnished his attorney the details of his real legal disability and evidence, including almost two hundred individual medical records, the death threat letter (proof of DURESS), and the letter issued by H. H. Margulies, M.D., London, England, on August 15, 1974 printed infra p. 19, proving CONSPIRACY TO PREVENT AUTHORITATIVE DISCOVERY and FRAUD, and proving that Petitioner was unable to make "*authoritative discovery*" until September 24, 1974; that Petitioner with letters dated September 19,

1975, October 7, 1975 and October 24, 1975 requested the Clerk of the District Court to furnish him those copies which his attorney had failed to supply him, and that he received same, including the District Court's order entered October 6, 1975, on November 5, 1975 only from said Clerk (Appendix B, p. 1b, infra); that his former attorney had withheld these documents to prevent Petitioner from personally submitting to the District Court the real reasons that prevented filing of his Tort claim with Respondent Veterans Administration within the two-year statute of limitations which ended on or about November 4, 1967; that the real reasons were criminal medical malpractices and continuous persecution as set forth in the Mandamus companion complaint Number *75 Civ 315 (CMM);* and that in addition, among other things, Petitioner had received one written death threat and numerous oral ones; that his late father and his mother (also since deceased) had been permanently crippled by arranged accidents that took place in the City of New York; that all United States Government officials, including Consuls and agents of the Federal Bureau of Investigation, refused to prosecute or enforce the laws or transmit his case to the Respondents in Washington, D.C.; that aside from his dismissed attorney, the many other law firms contacted refused to handle his case.

Due to his former attorney's misconduct, petitioner was also prevented from making a timely motion for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure which prescribes filing of the motion within 10 days after entry of the order.

With order entered September 22, 1976, (Appendix D, p.1d, infra), the Circuit Court of Appeals granted Petitioner's Pro Se motion for leave to withdraw the appeal with-

out prejudice so as to enable a motion before the District Court in accord with Rule 60 (b) (2) of the Federal Rules of Civil Procedure (new evidence).

Petitioner, Pro Se, then moved the District Court to enter an order relieving Petitioner of its former order dismissing the complaint on the basis of the new evidence submitted together with an Affidavit and Memorandum of Law. (Appellant's Brief Appendix pages 15 thru 31; District Court Docket No. 12). Petitioner contended that the statute of limitations must be tolled because the new evidence submitted showed that Respondent Veterans Administration found the Petitioner totally disabled from May 18, 1965 on, a time prior to the dates the Respondents were alleged to have committed the negligent acts, and that two medical reports issued by two well-known New York City hospitals, the truthfulness and accuracy of whose mental ailment diagnoses Petitioner strenuously contested in the accompanying Affidavit, showed a prima facie case of mental incapacity of the Petitioner; and that the Petitioner was and still is under *continuous medical treatment* for the original illnesses and their permanent damages, and that Petitioner's *authoritative discovery* of the negligent acts was made on September 24, 1974 only, the date of the Medical Report required by the Social Security Administration which meanwhile determined the onset of Petitioner's disability under the Social Security Act also to be May 18, 1965.[2]

Respondents did not oppose this motion.

The requested oral hearing was not held.

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[2] This motion was prepared for Petitioner by an American law school drop-out residing in Europe.

With opinion entered January 28, 1977 this Rule 60 (b) (2) Federal Rules of Civil Procedure motion was denied without a decision given on three of the four points raised and on the sole ground that:

> "Insanity such as constitutes a legal disability in most states, does not toll the statute of limitations under the Federal Tort Claims Act."
>
> *Casias v. United States, 532 F 2d 1339, 1342 (10th Cir. 1976); Accardi v. United States 435 F 2d 1239 (3rd Cir. 1970);"* Appendix C, p. 1c, infra.

Petitioner, Pro Se, filed a timely Notice of Appeal from this opinion together with a simultaneous Request for Reinstatement of his earlier appeal from the initial underlying order and for consolidation of both appeals. (District Court Docket No. 15.)

Petitioner's, Pro Se, Appellant's Brief dated July 20, 1977 raised essentially the same points as the Questions numbers 2, 3, 4, 7, 8, 9 presented in this petition and supported them not only with the essential Appendix but with ten Exhibits including the 17-page complaint, the 30-page Affidavit, and the opinion in Petitioner's Mandamus companion action File number *75 Civ 315 (CMM)* (Appendix F, p. 1f, infra); Certificate of Stay issued by Sainte Anne Hospital Center in Paris, France, United States Department of State letter dated August 11, 1967 to since deceased Congressman William F. Ryan and letter from Sainte Anne Hospital's psychiatric faculty staff to Petitioner dated October 17, 1976 showing that Petitioner was illegally imprisoned in this mental hospital under the auspices of the Paris Police Commissioner and Respondents' Department of State from June 13, 1967 to January 3, 1968 *during which period the two-year statute of limitations in this*

Tort case ran out, that Respondents' Department of State made untrue and fraudulent reports to Congressman Ryan about this imprisonment, and that the mental hospital's psychiatric staff refuses to release the contents of its records and declines responsibility for this false imprisonment, blaming the Paris Police Commissioner for it; the Social Security Benefit Information dated December 30, 1976 determining Petitioner's onset of disability to be May 18, 1965; the death threat letter received by Petitioner on April 17, 1969, and Respondents' Bonn Embassy's letter to Petitioner dated September 9, 1976 refusing him the requested mandatory consular protection from criminal persecution with infliction of great bodily harm by the German associates of his persecutors in the United States.

Petitioner argued:

(1) That the trial judge's way of handling the proceedings violated the 5th and 14th Amendments of the United States Constitution (*due process of law* and *equal protection of the laws*), and that his two decisions are, therefore, *void* under the Constitution and under common law;

(2) That the "*continuous treatment rule*" *tolls* this case's statute of limitations upon authority of *Accardi v. United States, DCSDNY,* 356 F. Supp. 218 (1973);

(3) That the "*authoritative discovery*" rule *tolls* this case's statute of limitations upon authority of: *Hammond v. U.S.,* DCEDNY, 388 F. Supp. 928 (1975); *Hulver v. U.S.,* DCWD Mo., 393 F. Supp. 749 (1975); *Kingston v. U.S.,* DCED Tenn., 265 F. Supp. 699 (1967), *aff'd* 396 F.2d 9, *cert. denied* 89 S.Ct. 396, 393 U.S. 960, 21 L. Ed. 2d 373; *Kuhne v. U.S.,* DCED Tenn., 267 F. Supp. 649 (1967);

(4) That the *criminal, unlawful* and *unconstitutional* acts that prevented Petitioner's timely filing of the administrative Tort Claim *toll* the statute of limitations in this case under Common Law and under the United States Constitution, upon authority of: *National Bank of Savannah v. All,* S.C. (4th Cir.), 260 F. 370 (1919), pages 370, 381, 384, 385; *Philco Corporation v. RCA,* DCED Penn., 186 F. Supp. 155 (1960); *Davis v. Wilson,* DCED Tenn., 349 F. Supp. 905 (1972); *O'Connor v. Donaldson,* 95 S.Ct. 2486 (1975); 54 C.J.S. §168, §197 and §213; 15A C.J.S. §62; 4th 5th, 8th and 14th Amendments of the United States Constitution (*right to be secure in his person; right not to be deprived of life, liberty, or property without due process; nor infliction of cruel and unusual punishment; right to equal protection of the laws*) and that the following Federal Statutes were severely violated in Petitioner's case: 18 U.S.C. §§241, 242, 1510, 1511, 1113, 113, 114, 13, 4, 201, 245, 371, 1702, 1703, 1709, Ch. 95, 96, §§2232, 2511; 22 U.S.C. §§1731, 1732, 1199, 1007; 42 U.S.C. §§1983, 1985.

Respondents' Brief for Appellees dated August 26, 1977 argued:

> This appeal should be dismissed insofar as it seeks review of the District Court's Order dismissing the complaint. [This referred to the underlying initial order entered on October 6, 1975.] (Appendix B, p. 1b, infra)

and that

> "therefore, the sole issue properly before the Circuit Court of Appeals is the only question which was presented to the District Court on plaintiff's

Rule 60(b) motion, viz., whether mental incompetence serves to toll the two-year statute of limitations for Tort actions against the United States."

(NOTE: Petitioner actually presented four questions to the District Court, three of which it did not answer).

Petitioner's Appellant's Reply Brief stated and proved that this was a rightful appeal from the underlying District Court order entered on October 6, 1975 (Appendix B, p. 1b, infra), because the Appellant filed timely Notice of Appeal from this underlying order, and upon his motion the Second Circuit Court of Appeals with Order entered September 22, 1976 (Appendix D, p. 1d, infra) granted the Appellant leave to withdraw the appeal without prejudice to renewal after the termination of a Rule 60(b) motion. A copy of said order was annexed.

Further, the Appellant's Reply Brief contained among others the following Exhibits:

(a) In support of his "*continuous treatment rule*" contention a 4-page list of "Hospitals and Physicians who treated the insured (Petitioner) for total disability disease" from May 18, 1965 to October 3, 1974, filed with Respondents' Veterans Administration Center in Philadelphia, Pa., as part of Petitioner's Total Disability claim on December 22, 1974. This list shows petitioner's *continuous treatment.* Appellant's Brief Appendix page 18 shows that this Total Disability insurance claim was approved by Respondent Veterans Administration in accord with Petitioner's contention;

(b) In support of his contention that organized medicine prevented *authoritative discovery* and that this also constituted *fraud,* a certified true copy of a handwritten letter

dated August 15, 1974 and envelope addressed by general practitioner Dr. H. H. Margulies, M.D., London, England, to the Medical Centre, Webb House, London, plus a typewritten transcript thereof. This letter contains a veiled request to the Medical Centre physician, who was to get the requested laboratory tests done and to also physically examine the petitioner, to make a *false* report as basis for the Social Security Administration's Medical Report demanded by that agency, to the effect that the laboratory test results and his physical examination findings on Petitioner were completely normal when in fact the Petitioner was very ill, and the true laboratory test results would have been at least as bad as those contained in the reports dated September 18, 1974 and September 24, 1974 of the Diagnostiches Zentrum Berlin which were attached to the Medical Report issued on September 24, 1974 for the Social Security Administration by Dr. med. Gernot Hilkenbach, West Berlin, showing that Petitioner had an intestinal candida infection, a toxic liver and toxic kidneys. Appellant's Brief Appendix p. 21-24.

The letter issued by Dr. H. H. Margulies, M.D. reads:

"August 15, 1974. Dear Doctor, This patient wants to claim a disability pension from the U.S.A., and has asked for a battery of investigations. The following: (1) Blood Sugar, (2) Blood Count, ESR, SGPT, SGOT, Gamma GT, Alkaline Phosphatase, Alkaline Amylase in serum and urine, Kreatinine, Urea, Uric Acid, *Urine Analysis* with culture, ECG, and stools for culture. The stool specimen will be brought along. *You will make your own conclusions about the list and from the history which are obvious, but I do want to refuse it.* Thanks. Yours sincerely (signed) Dr. H. H. Margulies

Envelope addressed to:

The Medical Centre
Webb House
210, Pentonville Road
Kings Cross, N 1 9 TA"
(Appellant's Reply Brief Exhibits p. 69–72)

Petitioner had never told Dr. Margulies about his history of criminal medical malpractice in the United States but he was given this information and unlawful instructions by the functionaries of organized medicine, and so were other British physicians.

(c) In support of Petitioner's contention that organized medicine used duress, undue influence, fraud, threats to cause him bodily harm and actually carried out these threats by inflicting great bodily harm upon him, including a new murder attempt in New York City, after his return from France on January 3, 1968 and until his new escape to Europe on April 13, 1971, and of the fraud, cover-up and condonence of these crimes by the New York State Department of Health, there were annexed copies of two of the Petitioner's complaints against four New York State licensed physicians which were part of his 17 complaints against approximately 30 New York State licensed physicians filed with the New York State Department of Health, Office of Professional Medical Conduct, Albany, New York, in April 1976, plus his correspondence with said Health Department and its Commissioner. (Appellant's Reply Brief Exhibits p. 73–84).

Petitioner's Appellant's Reply Brief argued in part in addition to the arguments contained in the Appellant's Brief: That Petitioner was by criminal, unlawful and unconstitutional means prevented from diligently investigating the deleterious consequences of the negligent acts and omissions of the Respondents inspite of his efforts. While Petitioner would have had to risk his life and that of his parents by filing a Tort claim for medical malpractice before August 2, 1974, such filing would have been futile, because the Respondent Veterans Administration would have insisted on statements from physicians and none of them was willing to issue a report directly or indirectly reflecting medical malpractice of other physicians and medical personnel until September 24, 1974, all proved by the Exhibits submitted, and that in order to put the sole burden for *discovery* on a claimant in such cases, his word alone would have to be accepted, and the requirements of physicians' statements would have to be abolished, and that the Exhibits also show that Petitioner's harmless demand in 1970 for a Medical Statement as to some but not all of his ailments, which mentioned nothing about medical malpractice and from which certainly no layman could conclude it, caused organized medicine to carry out a new *murder attempt* on Petitioner resulting in very great bodily harm and his having to flee the United States once more in order to save his life, and that for these reasons, the court opinions cited by the Respondents as to the "*continuous treatment rule*" and as to "*discovery of negligent acts and omissions*" are not applicable to this special case, and that *fraud* is an additional reason why the statute of limitations must be tolled in this special case. It was pointed out that the following court decision together with the authorities cited in the Appellant's Brief is the basis for deciding this special case: *Scarborough v. Atlantic Coast Line Railroad Co.*, 178 F.2d 253 (4th Cir. 1949), 15 A.L.R. 2d 491, *cert. denied* 339 U.S. 919, 70 S.Ct. 621, 94 L.Ed. 1343.

On October 12, 1977, Petitioner received the Circuit Court of Appeals Clerk's form letter dated September 27,

1977 stating: "The above entitled action will be taken on submission on Friday, October 14, 1977 at the 10:30 a.m. sitting." Petitioner signed the clause added to this letter by said Clerk reading: "Receipt of notice of date of submission is hereby acknowledged," and returned it to the Clerk on October 12, 1977. Rule 34(f) of the Federal Rules of Appellate Procedure reads:

> "By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued."

Petitioner took this notice to mean that the Circuit Court of Appeals did not permit or want any oral argument from any of the parties, and that certainly the Respondents were not permitted oral argument, unless Petitioner was in advance invited to do the same. The notice of date of submission was in any event sent and received too late for Petitioner to get to New York City in time even under normal circumstances. In his case, prior security arrangements would, however, have had to be made for his person by the United States Attorney General, and none of his past requests was ever granted, thus making it impossible for Petitioner to in person appear in the courts or to in person try to obtain the services of an attorney, and this means that Respondents put him in *total legal disability,* and *have completely deprived him of his constitutional rights.*

The Circuit Court of Appeals judgment underlying this petition entered on October 14, 1977, (Appendix A, p. 1a, infra), was received on December 5, 1977 only and stated:

> ". . . This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and *was argued by counsel. . .*"

This cause had neither been orally argued by Petitioner's non-existing counsel nor by the petitioner himself in person. Petitioner does not know whether or not Respondents' counsel was permitted to give oral argument without Petitioner's knowledge and what the contents were of such possible oral argument by Respondents. Nor does this judgment state the Opinion and Grounds on which the District Court's order was affirmed, making it impossible for Petitioner to give a proper response in this petition. He can only *guess* that the court below refused to consider the Mandamus companion case as part of the record on appeal, even though the essential parts thereof were together with corroborating evidence submitted with the Appellant's Briefs in the form of Exhibits, and prove that Petitioner was by *criminal, unlawful* and *unconstitutional* means prevented from filing his administrative Tort claim within the two-year statute of limitations, and prior to August 2, 1974, making a reversal of the District Court's order on the basis of the authorities cited mandatory.

The appeal and this petition were prepared by Petitioner without outside assistance and are completely in line with the facts, evidence and instructions he gave to his former attorney for presentation to the District Court, except that Petitioner until 1977 did not know how and where he could find the authorities for his legal points which common sense told him were valid under United States constitutional law and which he expected his former attorney to research. The respective correspondence with his former attorney could be made available.

Also, Petitioner's disability claims filed without outside assistance in 1974 with Respondents' Social Security Administration and Veterans Administration Life Insurance Center in Philadelphia, Pennsylvania, contain essentially the

same contentions as this Tort appeal to the court below regarding the cause of the untimely filing, and both agencies have never denied or refuted the fact that Petitioner was by *criminal, unlawful* and *unconstitutional* means prevented from timely filing, nor has the Department of Justice ever denied or refuted the facts submitted to it and to the courts below regarding his criminal persecution. By having made Rule 12 Federal Rules of Civil Procedure motions in this Tort case and also in the Mandamus companion case, the Respondents have in fact admitted the facts alleged in these complaints. (*See* 5A Moore's *Federal Practice* 52.08 at 2735).

REASONS FOR GRANTING THE WRIT

1. As a matter of law, the Circuit Court of Appeals should really have dismissed the appeal and remand the case to the District Court with instructions to give Petitioner leave to amend the complaint on the ground that the underlying District Court order entered on October 6, 1975 dismissing the complaint, (Appendix B, p. 1b, infra), *is not a final and appealable order* nor is the District Court opinion entered on January 28, 1977 denying Petitioner's Rule 60(b)(2) Federal Rules of Civil Procedure Motion, (Appendix C. p. 1c, infra), *a final and appealable order* because a judgment dismissing the *action* was never entered, and because the *action* could definitely be saved by an amendment of the complaint, and because Petitioner has shown by his Rule 60(b)(2) Federal Rules of Civil Procedure Motion that he first wanted to exhaust all available remedies then known to him in the District Court before proceeding with the appeal. *(See* 2A Moore's *Federal Practice* 12.14 at 2338, 2339, 2340 and authorities cited therein.)[3]

[3] Petitioner discovered the legal distinction between dismissing a *complaint* and dismissing an *action* during his research for this petition in February, 1978 only.

2. The trial judge knew from the Mandamus companion case as well as from the statements and indirect references thereto made in Petitioner's former attorney's Memorandum of Law in Opposition to Defendants' Motion to Dismiss The (Tort) Complaint that *criminal, unlawful* and *unconstitutional* acts (*conspiracy, duress, death threats, fraud criminal medical malpractices, continuous criminal persecution with infliction of great bodily harm, false imprisonment in mental hospitals* and *other criminal and unlawful acts*) prevented Petitioner from filing his adminstrative Tort claim within the two-year statute of limitations pursuant to 28 U.S.C. §2401(b) and prior to August 2, 1974. These facts were admitted by Respondents in making Rule 12 Federal Rules of Civil Procedure motions in both cases, (*see* 5A Moore's *Federal Practice* 52.08 at 2735 and authorities cited therein), and if the trial judge had any further questions on these facts, he was obligated to grant the requested oral hearing and argument. This he failed to do. While Petitioner's former attorney committed serious misconduct and presented the wrong written arguments and authorities, this did not relieve the trial judge from his obligation to make his own conclusions of law and search for the proper authorities applicable to these accepted facts. This he failed to do also. That this independent research is the trial judge's obligation is proved further by the fact that this same trial judge in deciding Petitioner's Rule 60(b)(2) Federal Rules of Civil Procedure motion in the instant case, (Appendix C, p. 1c, infra), cited prior decisions of other courts which the writer of Petitioner's motion had overlooked in his research and Respondents had not furnished, since they filed no opposing motion. Also, in his opinion entered on August 6, 1975 dismissing the Mandamus companion complaint, (Appendix F. p. 1f, infra), this same trial judge's citation of prior court decisions were researched

independently, and only one of them, *Inmates of Attica Correctional Facility v. Rockefeller,* 477 F.2d 375, 380 (2d Cir. 1973), was one of those that the Respondents had also cited in their Memorandum of Law. On the other hand, this same trial judge, even though he knew that *criminal, unlawful* and *unconstitutional acts* prevented Petitioner's timely filing of the administrative Tort claim, failed to research for authorities applicable to such circumstances and only answered Petitioner's former attorney's unauthorized argument about mental incapacity in his initial order entered on October 6, 1975, (Appendix B, p. 1b, infra.)

3. The Circuit Court of Appeals' judgment entered on October 14, 1975, (Appendix A, p. 1a, infra), gives no opinion, and Petitioner can only guess that the court below refused to consider the Mandamus companion case, the essential parts of which were submitted as Exhibits p. 2–53 with Appellant's Brief, not to mention the corroborating other Exhibits submitted therewith and with Appellant's Reply Brief, as part of the Record in the instant case, even though it had been advised that Petitioner's former attorney acted against Petitioner's explicit instructions and committed serious misconduct, and even though Petitioner's Appellant's Brief p. 10 pointed out that his former attorney's Memorandum of Law filed on July 10, 1975 in Appendix p. 6 and 7 thereto pointed out the *duress* and *criminal persecution* Petitioner was under and did not elaborate further on this because the trial judge had at time of filing of this Memorandum of Law all the facts about these criminal circumstances before him in the then-pending Mandamus companion case anyway. The deadline for this petition does not permit this non-lawyer Petitioner to find and read commentaries on the Appeals Courts' proceedings and powers, but it is clear that in the circumstance of this case,

it was the duty of the court below, if it felt that it was not empowered to issue a tolling judgment itself, to *reverse* and *remand* the case to the District Court for further exploration of the facts and for proper argument, because the facts are such that the statute of limitations must be tolled on the basis of the authorities cited to the Circuit Court of Appeals as well as infra in this petition. This should have been the procedure if the court below overlooked the fact that this was not a *final and appealable order* it was considering.

4. The judgment of the court below is in conflict with at least the following two Circuit Court of Appeals decisions cited in the Appellant's Reply Brief and Appellant's Brief, respectively:

(a) *Scarborough v. Atlantic Coast Line Railroad Co.,* 178 F.2d 253 (4th Cir. 1949), 15 A.L.R. 2d 491, *cert. denied,* 339 U.S. 919, 70 S.Ct. 621, 94 L.Ed. 1343, and the authorities cited therein;

This decision clearly states that in case of *fraud* and other deliberate wrongdoing the statute of limitations is *tolled,* also on *created* or *substantive* rights, such as the Federal Tort Claims Act;

(b) *National Bank of Savannah v. All,* S.C. (4th Cir.) 260 F. 370 (1919) at 370, 381, 384, 385, and the authorities cited therein;

This decision clearly states that in case of *duress, threat to take life or to inflict great bodily harm, or any other criminal or wrongful act that is "contra bonos mores"* the statute of limitations is *tolled.*

Further, the judgment of the court below is also in conflict with at least the following two District Court decisions cited in Appellant's Brief:

(c) *Philco Corporation v. RCA,* DCED Penn., 186 F. Supp. 155 (1960), and the authorities cited therein;

This decision clearly states that in case of *conspiracy* or *duress* the statute of limitations is *tolled in general.* This particular case was an action under the Sherman Anti-Trust Act which is also a *created* or *substantive* right;

(d) *Davis v. Wilson,* DCED Tenn., 349 F. Supp. 905 (1972), and the authorities cited therein;

This decision clearly states that if some *paramount authority prevents* a person from exercising his legal remedy, the statute of limitations is *tolled.*

Further, the judgment of the court below is, no doubt, also in conflict with many Supreme Court decisions, for example:

(e) *Duncan v. Thompson,* 315 U.S. 1, 6, 62 S.Ct. 422, 424, 86 L.Ed. 575, cited in *Scarborough v. Atlantic Coast Line Railroad Co.,* supra, at 258;

(f) *United States, Lyon, et al. v. Huckabee,* 16 Wall 414, 431, 21 L.Ed. 457, 83 U.S. 457, cited in *National Bank of Savannah v. All,* supra, at 381;

(g) *Braun v. Sauerwein,* (1870), 77 U.S. 895 (10 Wall 218), 19 L.Ed. 895, 896, 897, cited in *Davis v. Wilson,* supra, at 906.

The criminal persecution facts underlying Petitioner's case are, however, considerably worse than the circumstances which were underlying the decisions cited above, because *continuous bodily harm has been inflicted* on Petitioner and also his since-deceased parents were *bodily harmed* as part of Petitioner's *duress* and *intimidation* and *criminal persecution.*

5. It is, therefore, established that the court below has rendered a decision which is in conflict with the established law and procedure regarding *non-appealability* of dismissed *complaints* without a final order dismissing the *actions* having been entered. It is also in conflict with the decisions of other Circuit Courts of Appeals, Supreme Court and lower court decisions on the same subject matter, and the court below has also so far departed from the accepted and usual course of judicial proceedings, and has also so far sanctioned the departure by a lower court, as to call for an exercise of this Court's power of supervision. The question of whether or not Respondents were permitted oral argument without prior notice to Petitioner is also open. In addition to this, these proceedings have severely violated Petitioner's rights under the *5th and 14th Amendments of the United States Constitution* (*due process* and *equal protection of the laws*). This case will also provide this Court with the opportunity to clarify the statute of limitations limits of the Federal Tort Claims Act, and would thus greatly help to eliminate future misinterpretations thereof by the courts below and by administrative agencies, and would especially make it clear to those, who try to evade it by *criminal, unlawful* and *unconstitutional* means, that they cannot succeed.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HERBERT LEO PALM, *Pro Se*

Bahnpostlagernd
6000 Frankfurt am Main 11
Germany

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of October one thousand nine hundred and seventy-seven.

Present: HON. J. JOSEPH SMITH
HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
Circuit Judges,

Herbert Leo Palm, *Plaintiff-Appellant,* v. The Veterans Administration of the United States of America, and The United States of America, *Defendants-Appellees.*	CIVIL APPEAL :Docket No. Pro Se 76–6032 (Entered October 14, 1977)

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

By /s/ Arthur Heller
Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Herbert Leo Palm, *Plaintiff,* v. The Veterans Administration of the United States of America, and The United States of America, *Defendants.*	No. 75 Civ. 748 (CMM) (Entered October 6, 1975)

This motion to dismiss the complaint as time barred is granted.

The action has been instituted by an alleged discharged veteran of the armed forces of the United States. It is predicated on alleged malpractice committed by agents of the defendant at a Veterans Administration Hospital in 1965. It is clear that plaintiff knew at the time or shortly thereafter that he might have a claim. Since this action was not instituted until 1975, it is time barred by the two-year statute of limitations under the Federal Tort Claims Act, 28 U.S.C. §2401(b).

There is no showing of mental incompetency within the two-year period to avoid this result.

So ordered.

Dated: New York, N. Y.
October 6, 1975

/s/ Charles M. Metzner
U. S. D. J.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Herbert Leo Palm, *Plaintiff,* against The Veterans Administration of the United States of America, and the United States of America	Opinion No. 45558 No. Pro Se 75 Civ. 748 (CMM) (Entered January 28, 1977)

METZNER, D. J.:

This is a motion pursuant to Fed. R. Civ. P. 60(b)(2) for relief from an order of this court entered on October 6, 1975 which had dismissed the action.

Plaintiff, proceeding pro se, submitted the original motion papers on October 4, 1976. They were returned to him by the pro se office for failure to include an affidavit of service. For the purpose of this motion, plaintiff's papers will be deemed to have been filed with the court on the date they were originally received, and thus this motion is not time barred.

Plaintiff claims that certain evidence obtained by him subsequent to the October 6, 1975 order of this court establishes a prima facie case of mental incompetency sufficient to toll the two-year statute of limitations. "Insanity, such as constitutes a legal disability in most states,

does not toll the statute of limitations under the Federal Tort Claims Act." *Casias v. United States*, 532 F.2d 1339, 1342 (10th Cir. 1976); *Accardi v. United States*, 435 F.2d 1239 (3d Cir. 1970).

Plaintiff's motion is therefore denied.

So ordered.

Dated: New York, N. Y.
January 27, 1977

/s/ Charles M. Metzner
U. S. D. J.

APPENDIX D

UNITED STATES COURT OF APPEALS
Second Circuit

CIVIL APPEAL
Docket No. PRO SE 76-6032
(Entered September 22, 1976)

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 22nd day of September, one thousand nine hundred and 76

Herbert Leo Palm,
Appellant,

v.

The Veterans Administration of
the United States of America,
and the United States of America,
Appellees.

A motion having been made herein by Appellant pro se for leave to withdraw the appeal without prejudice to renewal after the termination of a Rule 60(b) motion

Upon consideration thereof, it is GRANTED.

Ordered that said motion be and it hereby is GRANTED.

/s/ Paul R. Hays
Paul R. Hays

/s/ William H. Timbers
William H. Timbers

/s/ Murray I. Gurfein
Murray I. Gurfein
Circuit Judges.

WHT MIG PRH

APPENDIX E

VETERANS ADMINISTRATION
Office of General Counsel
Washington, D.C. 20420

Aug 15 1974

CERTIFIED MAIL

In reply
refer to: 021

Mr. Herbert L. Palm
Groe. Niddastrasse 19a
75 Karlsruhe 41
Germany

Re: Administrative Tort Claim
Herbert L. Palm

Dear Mr. Palm:

This refers to your letter of August 2, 1974, alleging that in September, 1965, there was medical malpractice and nonpractice performed by doctors in the Veterans Administration Outpatient Clinic, 7th Avenue, New York, New York, and doctors of the Kingsbridge Veterans Administration Hospital, Bronx, New York.

Section 2401(b), as amended, provides, in part, that unless a claim is filed within 2 years from the time it accrues it shall be barred. Accordingly, the Veterans Administration is without authority to consider the claim.

We invite your attention to the provisions of the Federal Tort Claims Act (title 28, United States Code, sections 1346(b) and 2675) which provide, in effect, that a Tort Claim which is administratively denied may be presented to the Federal District Court for judicial consideration. Such suit must be initiated, however, within six months after the date of the mailing of this notice of denial (title 28, United States Code, section 2401). For the purposes

of these provisions, this letter will constitute a denial of your claim.

Since your letters of August 2, 1974, and May 19, 1974, indicate violations of certain criminal codes, copies of the letters are being referred to the Department of Justice for any action indicated since the investigation and prosecution of criminal matters is within that Department.

Sincerely yours,

/s/ John H. Kerby
JOHN H. KERBY
Assistant General Counsel

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Herbert L. Palm, *Plaintiff,* against United States of America and United States Attorney General and United States Department of Justice and United States Secretary of State and United States Department of State and United States Secretary of Health, Education and Welfare and United States Department of Health, Education and Welfare and Administrator of the Veterans Administration and Veterans Administration and United States Secretary of Agriculture and United States Department of Agriculture, *Defendants.*	No. 75 Civ. 315 (CMM) Opinion No. 42933 (Entered August 6, 1975)

METZNER, D. J.:

Defendants, the United States of America and various officials and agencies thereof, have moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing the complaint on the ground that it fails to state a claim upon which relief can be granted.

The complaint in this action seeks a writ of mandamus to compel most of the defendants to institute a criminal investigation into various allegations of criminal conduct much of which, according to the complaint, is being direct-

ed at plaintiff in an effort to murder him. In addition, the complaint seeks to have the Secretary of State furnish plaintiff with protection in a consulate while plaintiff remains outside of the United States, and to have the United States provide security for him as a government witness in the United States to enable him to return to this country from Germany where he now resides.

Jurisdiction is based on 28 U.S.C. §1361 (1970) which provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a *duty owed to the plaintiff.*" (Emphasis added.)

An action brought pursuant to this statute may properly seek to review "ministerial acts which are subject to positive command, plainly described and free from doubt" but not discretionary acts. *Fifth Avenue Peace Parade Committee v. Hoover,* 327 F. Supp. 238, 242–43 (S.D.N.Y. 1971).

In the instant case the complaint does not indicate how any of the officials or agencies named as defendants might owe plaintiff a duty to perform the actions which he seeks to compel. The main relief sought is to have the court compel criminal prosecutions but it is clear that:

> "In the absence of statutorily defined standards governing reviewability, or regulatory or statutory policies of prosecution, the problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary."

Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973).

The complaint also seeks to have the court turn plaintiff's allegations over to a grand jury even without the participation of the Attorney General, and to order plaintiff to testify after providing him with adequate security.

While it is true that the court has the authority to bring possible offenses to the attention of the grand jury, *O'Bryan v. Chandler,* 352 F.2d 987, 990 (10th Cir. 1965), *cert. denied,* 384 U.S. 926 (1966), *In re April 1956 Term Grand Jury,* 239 F.2d 263, 268–69 (7th Cir. 1956), it is also true that the grand jury may consider any charges, even those brought to its attention by a private citizen. *See, In re April 1956 Term Grand Jury, supra* at 268–69. Under these circumstances, there is no reason for the court to involve itself with the grand jury on plaintiff's behalf.

Finally, plaintiff's request for appointment of counsel must be deemed withdrawn inasmuch as an attorney has represented him in opposing this motion to dismiss.

For the above reasons, the motion to dismiss the complaint is granted.

So ordered.

Dated: New York, N. Y.
August 6, 1975

/s/ Charles M. Metzner
U. S. D. J.

No. 77-1268

In the Supreme Court of the United States

OCTOBER TERM, 1977

HERBERT LEO PALM, PETITIONER

v.

VETERANS ADMINISTRATION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

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HERBERT LEO PALM, PETITIONER

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VETERANS ADMINISTRATION AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

---

1. On August 2, 1974, petitioner wrote a letter to the Veterans Administration, contending that in September and October 1965 doctors in the Veterans Administration Outpatient Clinic, New York, New York, and the Kingsbridge Veterans Administration Hospital, Bronx, New York, committed medical malpractice in his treatment (Pet. App. 1e). The Veterans Administration informed him that the claim was barred because he had not filed an administrative claim within the two-year period provided by the Federal Tort Claims Act, 28 U.S.C. 2401(b) (Pet. App. 1e-2e).

In February 1975 petitioner brought this suit under the Federal Tort Claims Act in the United States District Court for the Southern District of New York (Pet. 9; Pet.

App. 1b). The district court dismissed the action on the ground that it was time-barred under 28 U.S.C. 2401(b). Petitioner then filed a motion for relief from the judgment pursuant to Fed. R. Civ. P. 60(b), presenting what he contended was new evidence relating to factors (including sanity) that might toll the time limitations. On January 28, 1977, the district court denied petitioner's motion, explaining that insanity does not toll the statute of limitations under the Federal Tort Claims Act (Pet. App. 1c-2c). The court of appeals affirmed (Pet. App. 1a-2a).[1]

2. The lower courts correctly held that petitioner's action is time-barred. Under the Federal Tort Claims Act, a plaintiff's claim for medical malpractice accrues when he knows, or in the exercise of due diligence has reason to know, that he has been injured. *Brown* v. *United States*, 353 F. 2d 578, 579 (C.A. 9); *Quinton* v. *United States*, 304 F. 2d 234, 240-241 (C.A. 5). Although petitioner knew or should have known in 1965—the time of the alleged malpractice—that he might have been injured (Pet. 7-8; Pet. App. 1b), he delayed presenting that claim to the Veterans Administration for nine years.

Petitioner appears to contend (Pet. 4, 14, 16, 18) that the limitation period was tolled by his mental incompetence and because he was under the continuing treatment of the same physician during the relevant period. Mental incompetence, however, does not toll the statute of limitations under the Federal Tort Claims Act. *Casias* v. *United States*, 532 F. 2d 1339, 1342 (C.A. 10); *Accardi* v. *United States*, 435 F. 2d 1239, 1241 (C.A. 3).

---

[1]Petitioner alludes (Pet. 8-9) to another action in which he sought a writ of mandamus to require the government to investigate alleged criminal conduct directed at him and to provide protection for him at a United States consulate. The district court dismissed the action (Pet. App. 1f-3f), and petitioner did not appeal.

And even if continuing treatment by a single physician tolls the statute of limitations when it creates a lulling effect (but see *Tyminski* v. *United States*, 481 F. 2d 257, 264 n. 5 (C.A. 3); *Ashley* v. *United States*, 413 F. 2d 490 (C.A. 9)), there is no evidence that petitioner was under the treatment of the same physician after 1965. To the contrary, petitioner apparently sought medical care at other institutions both in this country and abroad (Pet. 15-16, 18).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1978.

---

[2]Petitioner also appears to contend (Pet. 25-28) that he was prevented by "duress" from filing his claim in a timely manner. He admits (Pet. 25-26) that he did not present this theory, or evidence to support it, to the district court, but contends that the district court should have considered this theory nonetheless because duress was alleged in petitioner's contemporaneous mandamus action (see n. 1, *supra*). But the district court could not have taken judicial notice of petitioner's assertions concerning duress made in connection with the independent mandamus suit even if it had been asked to do so; the assertions were "subject to reasonable dispute," and therefore the court was not authorized to take notice of them. Fed. R. Evid. 201(b). In any event, petitioner was in the best position to inform the court of the circumstances that would support his suit.

DOJ-1978-05

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1268

HERBERT LEO PALM,

Petitioner,

v.

VETERANS ADMINISTRATION AND
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

HERBERT LEO PALM, *Pro Se*
Bahnpostlagernd
6000 Frankfurt am Main 11
Germany

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IN THE
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UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

This is in reply to the Memorandum For The Respondents In Opposition.

1. Respondents falsely state that "the District Court dismissed the ACTION (Memo 2). Actually, said Court dismissed the COMPLAINT only. (Pet. 3,11,17,24,29; Pet.App. 1b).

2. Respondents admit that Petitioner's Fed. R. Civ. P. 60(b)(2) motion raised more than one point, but that the District Court's Opinion answered only one point. (Memo 2; Pet. 14-21; Pet. App. 1c).

3. Respondents reference to the exercise of due diligence in filing the Tort claim is contrary to the facts in the case and the usual discovery rules do not apply in this case due to the CRIMINAL, UNLAWFUL and UNCONSTITUTIONAL interference. (Memo 2; entire petition and entire records 75 Civ 315 (CMM) and 75 Civ 748 (CMM) and Pet. 18-21 in particular.)

4. Petitioner personally has never contended that he was mentally incompetent due to a mental illness. The unauthorized statement to that effect of his former attorney, whom he dismissed due to his serious misconduct confirmed by the Association of the Bar of the City of New York, was not known to Petitioner until 22 days AFTER the District Court's dismissal of the complaint inspite of the due diligence exercised to obtain a copy there-

of at time of its filing and while the complaint was pending. (Pet. 11-13). The statement in Petitioner's Fed. R. Civ. P. 60(b)(2) Memorandum of Law prepared by someone else to the effect that his newly discovered evidence consisted, among other things, of two medical reports until then unknown to him showing mental illness, even if untrue, must be legally accepted as a "prima facie" showing of mental incapacity, was signed by Petitioner only because in the accompanying sworn Affidavit Petitioner stated:

> "8. I have never been informed by a competent medical authority of the fact that I suffered mental disorder until receipt of the documents heretobefore referred to as Exhibits "B" and "C" .
>
> 9. I strenuously contest the accuracy of the mental ailment diagnosis contained within the aforesaid medical reports and, without prejudice, deny that I am now or ever have been mentally ill. "

In his personally prepared appeal and petition, Petitioner made no claim of mental

incompetency at all. He merely furnished the required abridgement of the prior proceedings and a statement of the fact that he was illegally imprisoned for over 7 months in two mental hospitals and that the statute of limitations ran out during such illegal imprisonment (Pet. 8, 15-16). His real contentions are stated in "QUESTIONS PRESENTED" (Pet. 3-6) and "REASONS FOR GRANTING THE WRIT" (Pet. 24-29).

5. Petitioner never contended that he was under the continuing treatment of the same physician. He, in fact, submitted with the Appellant's Reply Brief a 4-page list of "Hospitals and Physicians who treated the insured (Petitioner) for total disability disease." (Pet. 18). It is known to the Respondents from Petitioner's letter dated August 2, 1974 to the Veterans Administration that the medical malpractices of the VA physicians in September and October, 1965 consisted mainly of REFUSAL of treatment and REFUSAL of hospitalization of the then fatally ill Petitioner to which he was entitled as a veteran, especially since he could not get the

proper treatment anywhere else in the United States. Consequently, Petitioner could NOT continue treatment with the same physician who REFUSED him such treatment in the first place. For this reason alone, and there are others besides, the authorities cited by Respondents on the "CONTINUOUS TREATMENT RULE" do not apply to this case. (Memo 2-3; Pet. 4, 16, 18, 21).

6. Petitioner's Mandamus Application was a COMPANION case directly related to this case and the Veterans Administration was a Defendant therein. It not only asked that the government investigate the criminal acts directed at Petitioner and to accord him consular protection, which means diplomatic representations to foreign governments in whose countries transgressions against United States citizens occur (22 U.S.C. § 1731, § 1732), but to also investigate and prosecute the criminal acts of certain members of the New York crime syndicate to which Petitioner became an involuntary witness (one murder, another possible murder, interstate wholesaling of narcotics, illegal gambling, prostitution and tax evasion operations, etc.), and to question him as

government witness subject to proper security arrangements by the Attorney General. The District Court granted the United States Attorney's Rule 12 Fed. R. Civ. P. motion based on gross abuse of his discretion not to investigate and prosecute without oral hearing and because of the constitutional "separation of powers" doctrine. (Pet.7-10); Pet.App. 1f-3f). The Opinion cited one other District Court and two Appeals Court decisions on one of which certiorari was denied. Petitioner did not appeal to the Court of Appeals because:

a) He had no attorney who was willing to appeal it and did not know then himself how to prepare an appeal;

b) He did not know then where in Europe he could check out the authorities cited and had no choice but to accept them at face value.

However, aside from bringing the case directly to the attention of the Federal Grand Jury and never receiving a reply (Pet.9-10), Petitioner, after receiving the District Court's order on September 17, 1975 only (Pet. 1f-3f), brought this case in detail (App.

with letter dated September 24, 1975 to the personal attention of then President Gerald Ford. Petitioner specifically requested President Ford:

" 1. To order the United States Attorney General to investigate and prosecute all violations of the Federal criminal statutes described in my Affidavit dated September 9, 1974, a copy of which is annexed hereto.

(The original Affidavit can be found in the Court's file. The complete file should also be available from the above cited Defendants and from the United States Attorney for the Southern District of New York. The case file contains many Exhibits.)

2. To order the United States Attorney General to turn this case over to a Federal Grand Jury or Special Federal Grand Jury, because racketeering and racketeer influenced and corrupt organizations are involved, and to order me to appear before such Federal Grand Jury or Special Federal Grand Jury after fool-proof security arrangements

are made for my person.

3. To order the United States Attorney General to make fool-proof security arrangements for my person as a government witness with particular emphasis on unadulterated water, unadulterated food and unadulterated medicines, as well as to provide me with proper legitimate medical care, if and when I should ask for same, all in the United States of America, so that I may be enabled to return to the United States as a government witness.

4. To order the United States Secretary of State to furnish me the proper consular protection to which I am entitled as a United States citizen while I remain outside the United States.

("Consular protection " means forceful diplomatic representations to the foreign governments in whose countries my civil rights and security of my person are violated, if I request such representations from the consular officials in the area, and not necessarily protective housing in a United States

Consulate,as District Judge Metzner interpreted it in his decision.) "

The same requests were already made in Petitioner's dismissed Mandamus complaint.

With letter dated October 29, 1975, the Counsel to President Ford, Mr. Philip W. Buchen, replied:

"Dear Mr. Palm: By this letter, I hereby acknowledge receipt of your letter dated September 24, 1975, concerning your"Petition for Writs of Mandamus" in the matter of Palm v. United States, et al.

By law, the Department of Justice is responsible for handling suits against the United States. Accordingly, I have referred this correspondence to the Office of the Attorney General for appropriate handling. Sincerely."

With registered air mail letter dated January 5, 1976, return receipt received, Petitioner advised Mr. Philip W. Buchen, Counsel to President Ford:

> "...I regret to advise you that up to this date I have heard nothing at all from the Office of the Attorney General. I would, therefore, greatly appreciate your checking into the status of this matter and your advising me as to when I may expect to hear from the Office of the Attorney General....."

Petitioner never received a reply to this inquiry nor an advice from the Office of the Attorney General on the action taken.

This proves that Petitioner had in the constitutionally most effective way promptly appealed the Mandamus dismissal order (Pet.App. 1f-3f) without getting the requested action from the then President and Attorney General of the United States.

7. The Fed. R. Evid. 201(b) did not prevent the trial judge from taking judicial notice of Petitioner's assertions concerning DURESS and other CRIMINAL, UNLAWFUL and UNCONSTITUTIONAL acts in connection with the companion Mandamus suit (Memo 3). These assertions were no longer "subject to reasonable dispute" because Respon-

dents waived their right to establish the facts in regular Grand Jury and Court proceedings and instead chose to make a Rule 12 Fed. R. Civ. P. motion on the grounds of "DISCRETION" and "SEPARATION OF POWERS". By doing so, they admitted the facts contained in Petitioner's complaint and affidavit. (See 5A MOORE's Federal Practice 52.08 at 2735) (Pet. 24-28). Besides, Petitioner was and is willing to at any time testify in person, present his evidence and name the corroborating witnesses, subject to proper security arrangements for his person. The Mandamus suit was a COMPANION case in which Respondent Veterans Administration was one of the Defendants for the same acts underlying this Tort suit, and from it the trial judge was aware of the fact that Petitioner was by CIMINAL, UNLAWFUL and UNCONSTITUTIONAL means prevented from filing of his Tort claim until August 2, 1974. Besides, Petitioner's former attorney's statement as to "mental incapacity" (Pet. 10-12) amounted to an assertion of duress because the trial judge correctly found

Petitioner mentally competent inspite of his knowledge from the Mandamus companion suit of Petitioner's over 7 months illegal imprisonment in mental hospitals. Therefore, the assertion of duress was for all practical purposes made by Petitioner's former attorney. Had the trial judge held the requested oral hearing, this would, no doubt, have come out of it, and as a result his former attorney's Memorandum of Law or complaint would have been amended accordingly. Petitioner was not in a position to personally bring these circumstances to the trial judge's attention while the Tort complaint was still pending because, inspite of the exercise of due diligence, he did not receive his former Attorney's Memorandum of Law until 22 days after the complaint was dismissed (Pet. 12), and without knowing what his attorney had presented, it would have been inappropriate and hysterical for Petitioner to submit the circumstances directly to the District Court. He did so, however, promptly in his Notice of Appeal (Pet. 12-13). Petitioner had made transatlantic telephone calls to his former attorney regarding the non-receipt and con-

tents of his Memorandum of Law on July 22, August 7, 12, 18, 23, 25 and 26 (twice), 1975, and every time his former attorney claimed to have repeatedly airmailed duplicate sets of copies to him, the last one even "registered". He also claimed that he had presented the CRIMINAL, UNLAWFUL and UNCONSTITUTIONAL circumstances to the District Court as per Petitioner's instructions. Since all of Petitioner's incoming mail and all identifiable outgoing mail, also to and from this Court, has all along been illegally opened by German postal employees with equipment of their intelligence services and its contents then disseminated to Petitioner's persecutors and other interested parties in various countries, and since some of his mail was in the past never delivered to him or on purpose delivered with great delay only, Petitioner was not in a position to promptly accuse his former attorney of any wrongdoing. After all, persons admitted to the bar are supposed to be responsible and of good moral character and obligated to adhere to certain professional ethics. Therefore, it is out of place to try to burden Petitioner with the misconduct

of his former attorney. Petitioner would certainly not have hesitated to submit the circumstance directly to the District Court if he had received the Memorandum of Law or had been able to obtain correct knowledge of its contents before the complaint was dismissed, and this is exactly what he did in his Notice of Appeal and what his attorney wanted to prevent.

In any event, the District Court had the discretion to take judicial notice of the Mandamus suit without being specifically requested to do so. (See 10 MOORE's Fed. Practice § 201.30 at II-38 and authorities cited therein; also Notes 11., 12., 42.(2,3,5), 43.(2) Fed. Rules of Evidence Annot. 201).

Furthermore, Petitioner presented the criminal, unlawful and unconstitutional circumstances of his case to the Appeals Court and requested it to take judicial notice of the Mandamus suit by reference to the original record available in the same courthouse and submitted to it the essential documents in the form of Exhibits.

Therefore, it was MANDATORY upon the Appeals Court to take judicial notice of it which it obviously refused to do. (See 10 MOORE's Fed. Practice § 201.40 at II-39 and § 201.60 at II-43 and authorities cited therein; also Notes 14. and 43.(1) Fed. Rules of Evidence Annot. 201). Respondents did not challenge Petitioner's request in the Appeals Court and, therefore, cannot now do so. (See 10 MOORE's Fed. Practice § 201.50 at II-40-42 and authorities cited therein.)

It should not be overlooked that it is Respondents' unwillingness to enforce the laws that forced Petitioner to live in involuntary exile and to flee the United States twice in order to save his life. Since it is Respondents who put him under total legal disability, it is out of place for them to try to hold omissions against him.

8. Petitioner herewith requests this Court to take judicial notice of the fact that on April 7, 1978, a murder attempt was made on him with exhaust gas from his deliberately tampered with automobile, and the needed oxygen and proper medical treatment were

denied him. In addition, the drinking water and food were mixed and sprayed with carbon oxide related chemicals and such chemicals were also infiltrated in his apartment with the result that Petitioner had to leave his apartment and travel in a state of near death through various European countries in an attempt to obtain unadulterated water and food and proper medical care. This carbon oxide poisoning has caused severe physical damages under which Petitioner continues to suffer and is expected to suffer for a long time to come. He returned to his apartment on May 3, 1978 only, and same is still being gassed to prevent recuperation. The facts can be proved by written evidence. It is clear that this murder attempt was made as a result of his having submitted this petition. Petitioner's claims of criminal interference with the assertion of his legal rights are, therefore, proved further. It is safe to say that, as before, certain officials of the United States Consulate General in Frankfurt am Main, Germany, knew in advance that such murder attempt would be made.

9. In light of the facts in this case and the legal situation, it is rather disappointing that Respondents, who are by law obligated to treat citizen litigants fairly and squarely, did not forthrightly admit that they have no valid defense in this case. Instead, apparently in an attempt to cover up their inactions against the largest and most powerful crime syndicate in the United States [1], they tried to distort the factual and legal circumstances of this case and dealt with the most important issues in footnotes.
It would seem that President Carter's call for morality in government and for protection of citizens' human rights made no impression on Respondents.

10. Kindly SEARCH THE RECORD of the Tort and Mandamus cases.

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[1] Crime syndicate means activities usually ascribed to the Mafia only.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, or, if procedurally possible, the case should be remanded to the District Court with instructions to give leave to amend the complaint.

Respectfully submitted,

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May 1978